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Evidence Code: General Provisons

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FLORIDA LAW REVISION COUNCIL

PRELIMINARY WORKING DRAFT

Evidence Code

GENERAL PROVISIONS

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The ideas and conclusions set forth herein, including the draft of proposed legislation, have not been seen or approved by the Florida Law Revision Council. This material is being circulated to members of the bench and the bar for the purpose of eliciting comments and suggestions for improvement. Any communication concerning this project should be sent in writing to the Law Revision Council, Holland Building, Room 346, Tallahassee, Florida 32304.

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INTRODUCTION

For several years, the Florida Law Revision Council has studied and considered the desirability and need for statutory adoption of most of the basic rules of evidence. At first, the Council carefully explored and received advice on the obvious threshold questions of whether the rules of evidence are appropriate for codification and, if so, whether this should be accomplished through legislative enactment or through court rules.

The need for codification has long been accepted by leading scholars in the field of evidence, see Morgan, Forward, A.L.I. Model Code of Evidence 6 (1942); Ladd, A Modern Code of Evidence, 27 Iowa L. Rev. 213, 214 (1942); McCormick, Evidence, xi (1954), and there is a clearly developing trend throughout the United States toward this effort, "Public discussion must concern itself with the merits, means and objectives of codifying the entire law of evidence.....Failure to do so is more than a failure in semantics-it is a failure in vision." Papale, Editorial: Reflections on the Proposed Louisiana Code of Evidence, 12 Loyola L. Rev. 51, 53 (1965-66). Growing caseloads continue to put strains on the time of trial judges and attorneys and on their ability to "find the Law" in the rapidly increasing number of reported cases. The pace of modern litigation does not allow the luxury of hours spent in the law library finding cases to support the many basic rules of evidence.

The need to aid bench and bar in the trial of lawsuits is

accompanied by a corollary need for uniformity within the state. Many of those urging the Council to undertake this project were motivated by a lack of uniformity in the application of the case law of evidence. Even those who have become comfortable with the present sources of evidence law must concede that uniformity does not now exist throughout the state.

The debate over whether the enactment of a comprehensive code of evidence should be accomplished by legislation or by court rules will continue, see, Green, To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?, 26 A.B.A. J. 482 (1940). The point was debated before adoption of the Federal rules by the Supreme Court, and several states have faced the issue, see Cal. Stat. Ann., Evidence, §§1-1605(1966); N.J. Stat. Ann. §§2A:66-81 through 2A:66-84; Kan. Stat. Ann. §§60-401 through 60-470 (1964); also see Note, Evidence Law in Wisconsin: Towards a More Practical, Rational and Codified Approach, 1970 Wisconsin L. Rev. 1178.

Florida's division of authority between the Legislature and the Supreme Court with respect to substantive law and procedural law would make the promulgation of a code of evidence impossible without the cooperation of these two branches of government. Fla. Const. Art. V, Sec. 2 (1972 revision). Questions of substance vs. procedure have been debated for years, and no one has ever been able to draw a clear dividing line. More important, even if a line could be drawn the substance and procedure of the law of evidence are often too interwoven to be separated. A code of evidence must contain both substance and procedure, so its promulgation must be a cooperative effort between the Legislature and the Supreme Court. The Law Revision Council must find the avenue of cooperation between these branches of government which will allow the enactment of rules of evidence free from doubts concerning the constitutional authority of either the Court or the Legislature to promulgate this hybrid of substance and procedure.

In summary, the Council is attempting to draft an organized, orderly, statutory expression of the law of evidence, based on the opinions of our state courts and supplemented where necessary by the decisions of the Federal courts and those of our sister states. The Council recognizes that an evidence code cannot provide a clear answer to every question that may arise, and the courts will still be left with the job of interstitial development; but a code can provide the basic structure of the law of evidence. Members of the bench, the bar and the Legislature have been asked to help. Until its final recommendation to the Legislature the Council will continue to analyze and examine the tentative drafts. The Council solicits written comments from lawyers, judges, teachers, bar groups, and anyone else interested in the law of evidence.

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REPORTER'S INTRODUCTORY MEMORANDUM

Submitted herewith is the Preliminary Working Draft of the section of the Florida Code of Evidence dealing with General Provisions.

This section is one of the ten that will be included in the Code. The outline under which the Reporter is preparing the Preliminary Working Draft is:

Section 90.100	General Provisions
Section 90.200	Judicial Notice
Section 90.300	Presumptions
Section 90.400	Relevancy
Section 90.500	Privileges
Section 90.600	Witnesses (Competency, Impeachment, Character, Refreshing Recollections, etc.)
Section 90.700	Opinions and Expert Testimony
Section 90.800	Hearsay
Section 90.900	Authentication and Identification
Section 90.1000	Contents of Writings, Recordings and Photographs (Best evidence rule, Summaries, etc.)

In the General Provisions section, the application of the rules of this code to particular types of proceedings is defined, the Harmless Error rule as applied to evidentiary rulings is expanded and some other generally accepted principles are included. Attention should be given to Section 90.103 which defines the types of proceedings to which the provisions of this code are

applicable. The Reporter has included a few of the provisions, although he is not certain that they are desirable.

It is hoped that the discussion and comment which will result from the circulation of this portion of the Preliminary Working Draft will lead to the proper resolution of whether the various provisions should be included in the Code. Without the inclusion of these provisions in this draft, the necessary discussion would not occur.

The remaining sections of this Preliminary Working Draft will be submitted as soon as they are completed. The present plans of the Reporter are that their submission will be by October 1973.

General Provisions

Sec. 90.101 Short title. This chapter shall be know and may be cited as the "Florida Evidence Code".

Sec. 90.102 Purpose and Construction. This chapter shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined. The rule of the common law that statutes in derogation thereof are to be strictly construed, has no application to this chapter.

COMMENT

This section continues the philosophy expressed in Civ. Pro. 1.010 and Crim. Pro. 3.020. Similar provisions are contained in Fed. Rule Evid. 102; Calif. Evid. Code §2; New Jersey Evid. Rule 5; Fed. R. Crim. Pro. 2; and Fed. R. Civ. Pro. 1.

Sec. 90.103 Scope.

(a) The provisions of this chapter govern proceedings in every action before the Supreme Court, District Courts of Appeal, Circuit Courts, or County Courts, including proceedings conducted by a court commissioner or similar officer.

(b) The provisions of this chapter do not apply to:

(1) grand jury proceedings;

(2) preliminary hearings in criminal cases;

(3) proceedings involving sentencing, or granting or revoking probation;

(4) issuance of warrants for arrest, criminal summonses, and search warrants; and to

(5) proceedings with respect to release on bail or otherwise.

COMMENT

Subdivision (a) The revision of Article V of the Florida constitution simplified the court system and vested the judicial power of the state in the four (two trial and two appellate) named courts. Specific language insures the applicability of the evidence code to proceedings conducted by a referee or similar official appointed by the court. Similar provisions are contained in the Calif. Evid. Code §300 and Fed. Rule Evid. 1101.

Subdivision (b) This section does not limit or otherwise narrow the circumstances under which constitutional consideration of procedural due process may require an evidentiary hearing. Certain types of proceedings are exempted from the application of the evidence code for reasons of policy or to effectuate the efficient administration of justice as expressed in Section 90.102.

(1) Since grand jury proceedings are both ex parte and interlocutory in nature, and require only "probable cause" to return an indictment, there is no requirement to subject their deliberations to requirements of jury-trial rules of evidence. 2 Wigmore, Evidence §465 (3rd ed. 1940). The United States Supreme Court has ruled that grand jury inquiries should take place unfettered by technical rules. Costello v. United States, 350 U.S. 359 (1965). Chapter 905 of the Florida Statutes provides for a broad, comprehensive grand jury system with wide powers of investigation. The imposition of trial evidence rules is incompatible with this statutory scheme.

Moreover, this chapter does not deal with the evidence required to support an indictment. A similar provision is contained in Calif. Evid. Code §300.

(2) This section exempts preliminary hearings in criminal cases from application of the evidence code. Although hearsay testimony is routinely received in such examinations, authorities are divided on the applicability of evidence rules to such hearings. See Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L.J. 1149 (1960). In Florida, preliminary hearings are regulated by Rule 3.122 of the Rules of Criminal Procedure. No specific allowance is made for the application of any evidence rules to preliminary hearings. The philosophy of simple and fair determination of criminal matters expressed in Rule 3.020 is best served by allowing the Florida Rules of Criminal Procedure to regulate the applicability of this chapter to preliminary hearings.

A similar provision is contained in Fed. Evid. Rule 1101.

(3) This section does not extend the applicability of the evidence code to sentencing or probation proceedings, primarily because of the reliance upon the presentence investigation and report, a hearsay document prepared by

an agency outside the court in accordance with Chapter 948 Florida Statutes. Although such reports are not mandatory in Florida under Rule 3.790 of the Criminal Procedure Rules, the maximum discretion available to the court is preserved. A similar provision is contained in the Calif. Penal Code §1203.

(4) Arrest and search warrants are issued upon complaint and affidavit showing probable cause. The nature of such proceedings makes the application of this chapter inappropriate and impractical. See Fla. Rules Crim. Pro. 3.121, Chapter 901 and 933 of the Florida Statutes. See Fed. Evid. Rule 1101.

(5) The procedures embodied in Fla. Rules of Crim. Pro. 3.130 and Chapter 903 of the Florida Statutes make the application of formal evidence rules to bail matters unnecessary. See Fed. Evid. Rule 1101. Similar to the Federal practice, habeas corpus proceedings are not exempted from applicability of the evidence code. Since Chapter 79 of the Florida Statutes already provides for an evidentiary hearing on the writ, no hardship is seen by the imposition of trial-type proceedings. See Townsend v. Swain, 372 U.S. 293 (1963). A similar provision is contained in Calif. Penal Code §1484 and Fed. Evid. Rule 1101.

Sec. 90.104 Rulings on Evidence.

(a) A court may predicate error, set aside or reverse a judgment, or grant a new trial on the basis of admitted or excluded evidence when a substantial right of the party is affected, and

(1) when the ruling is one admitting evidence, a timely objection or motion to strike must appear on the record, stating the specific ground of objection if the specific ground was not apparent from the context; or

(2) when the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer of proof or was apparent from the context within which the questions were asked.

(b) A court shall conduct proceedings, in cases tried to a jury, to the maximum extent practicable, to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements, offers of proof or asking questions in the hearing of the jury.

(c) Nothing in this section shall preclude a court from taking notice of plain errors affecting substantial rights although such errors were not brought to the attention of the judge.

COMMENT

Subdivision (a) This section amplifies §59.041 of the Florida Statutes in stating the "harmless error" rule as it applies to evidentiary rulings by the court. In addition to the requirement that a substantial right of a party be affected, the nature of the error must be called to the attention of the court so that proper remedial measures by judge and counsel may be taken. The objection and the offer of proof are the means to accomplish that goal. The Florida cases have long followed this rule. In Butler v. State, 94 Fla. 163, 113 So. 699 (Fla. 1927) the court said:

> Technical error, committed by a trial court in the reception or rejection of evidence, does not necessarily constitute harmful error. It is injury resulting from error that warrants an appellate court in reversing a judgment of the trial court.

The provisions of §59.041 regarding other alleged errors are not affected. The question of harmless constitutional error is not covered by this section but is examined in Chapman v. California, 386 U.S. 18 (1967).

Existing Florida law also requires that a timely specific objection be made to preserve the point on appeal;

see Nat Harrison Associates, Inc. v. Byrd, 256 So. 2d 50 (Fla. 4th Dist. 1971); Hanish v. Wildee, 210 So. 2d 491 (Fla. 3rd Dist. 1968), and that an offer of proof be made when the evidence is excluded unless the answer is apparent from the question asked, see Browder v. Da Costa, 91 Fla. 1, 109 So. 448 (1926). Fla. R. Civ. Pro. 1.450(b) provides that the court may add to the offer that shows the character of the evidence, the form in which it was offered, the objection made and the ruling thereon in order to reproduce for higher tribunals, as exactly as possible, a reproduction of the events in the trial court. Rule 1.450(b) also allows the court to exercise its discretion to produce on the record, in both jury and non-jury cases, what the witness's testimony would have been if the question had been answered.

Similar provisions are contained in Fed. Rule Evid. 103, Calif. Evid. Code §§353-54, Kansas Code of Civ. Pro. §§60.404, 405 and Uniform Rules 4 and 5.

Subsection (b) A ruling which excludes evidence is a pointlessly formal and ritualistic procedure if the excluded evidence nevertheless comes to the attention of the jury. Baston v. United States, 389 U.S. 818 (1968). Both Fed. R. Civ. Pro. 43(c) and Fla. R. Civ. Pro. 1.450(b) provide that "[t]he court may require the offer to be made out of the hearing of the jury." Additionally, this section provides that

preliminary questions upon which the offer is based do not have to first be asked in the jury's presence. A similar provision is contained in Fed. Evid. Rule 103.

Subsection (c) The purpose of this subsection, which is in accord with Fed. R. Crim. Pro. 2(b), is to allow appellate courts to raise issues sua sponte. Under Fla. R. Crim. Pro. 1.530, the judge may order a new trial or rehearing and under Fla. Crim. Pro. 3.580 order a new trial or arrest the judgment.

The subsection is applicable to both criminal and civil cases although it is traditional that only in criminal cases have appellate courts displayed unwillingness to be bound by breakdowns in the adversary system, also, numerous examples exist with the same effects in civil cases. See Campbell, Extent to Which Courts of Review will Consider Questions Not Properly Raised and Preserved, 7 Wis. L.Rev. 91 (1932); Vestal, Sua Sponte Consideration in Appellate Review, 27 Fordham L.Rev. 477 (1958-59). Generally, this section will be applied more often when evidence is erroneously admitted since the failure to comply with the requirements of offer of proof will result in an absence of material in the record to disclose the error.

A similar provision is contained in Fed. Evid. Rule 103. See McCormick, Evidence §52 (2nd ed. 1972).

Sec. 90.105 Preliminary Questions.

(a) Except as provided in Subsection (b), the court shall determine preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence. In making its determination, a court is not bound by the rules of evidence expressed in this chapter except as provided in Section 90.501- .

(b) When the relevancy of evidence depends upon the existence of a preliminary fact, the judge shall admit the proffered evidence when there is evidence sufficient to support a finding of the preliminary fact. If evidence is not introduced to support a finding of the preliminary fact, the court may admit the proffered evidence subject to the introduction of evidence of the preliminary fact.

(c) Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be similarly conducted when the interests of justice require, or when an accused is a witness, if he so requests.

(d) The accused does not, when testifying upon a preliminary matter, and limiting such testimony

to the preliminary matter, subject himself to cross-examination as to other issues in the case.

COMMENT

Subdivision (a) When a party objects to the introduction of proffered evidence on the basis of an exclusionary rule, the applicability of the rule and the admission or exclusion of the evidence often turn upon the existence of a condition. This section makes preliminary questions the responsibility of the judge, i.e., whether the witness is competent to testify, whether the alleged medical expert is a currently licensed physician, and whether the witness whose former testimony is offered is unavailable. See Bell v. Kendrick, 25 Fla. 778, 6 So. 868 (1889); Perma Spray Mfg. Co. & La France Industries of Miami, Inc., 161 So. 2d 13 (Fla. 3rd Dist. 1964).

To the extent that these inquiries are factual, the judge acts as a trier of fact. Of necessity, he will receive evidence, both pro and con, on the issue in dispute. The provisions of this chapter apply to this process. If the primary justification for exclusionary evidence rules is to prevent the jury from receiving information which is unnecessary and prejudicial to their function, no reason exists to apply these rules to a hearing before a judge on preliminary

matters. He should be able to hear any relevant evidence, such as affidavits or other reliable hearsay. See McCormick, Evidence §53 (2nd ed. 1972).

Similar provisions are contained in Fed. Evid. Rule 104, and New Jersey Evid. Rule 8 (1).

Subdivision (b) This subsection concerns conditional relevancy, i.e., the relevancy of one fact depending upon the existence of another fact. For example, if an oral statement is relied upon as notice to the defendant, it has no probative value unless the defendant heard it. Under this subsection, the court makes a preliminary determination whether the foundation evidence is sufficient. If so, the item is admitted. If, upon the close of all the evidence submitted, pro and con, the jury could reasonably conclude that the preliminary fact is not established, the issue is for their determination. If the evidence will not permit such a finding, the court withdraws the matter from their consideration. For example, if a letter from A is relied upon to establish an admission by him, and after all the evidence is heard, it is reasonable to conclude that A did not write or authorize the letter, the jury will determine whether A has made the admission relied upon. If, however, it appears that the evidence will not allow

the jury to conclude whether A is responsible for the letter, consideration of the admission will be removed by the judge from their deliberations.

Similar provisions are contained in Calif. Evid. Code §403, New Jersey Evid. Rule 8 (2) and Uniform Rules of Evid. 19 and 67.

Subdivision (c) Pursuant to the Supreme Court decision in Jackson v. Denno, 378 U.S. 368 (1964), hearings on the admissibility of confessions must be conducted outside the hearing of the jury. Detailed classification and categorization of other situations when similar treatment of preliminary matters is desirable are difficult to formulate A great deal of evidence on preliminary questions, although not relevant to jury issues, may be heard by the jury with no adverse effect, avoiding time consuming delay and repetition. This is particularly true where the same evidence used to establish fulfillment of a condition precedent to admission is also relevant to weight or credibility. See Fed. Evid. Rule 104.

Subdivision (d) Because of the wide latitude of cross-examination allowed in §90.611, some protection to the accused must be afforded if he is to participate in the determination of preliminary matters. This section provides the necessary

safeguards without passing on the question of the subsequent use of testimony given by an accused at a hearing on a preliminary matter. See Harris v. New York, 401 U.S. 222, 28 L.Ed. 2d 1, 91 S. Ct. 643 (1971); Simmons v. United States, 390 U.S. 377, 19 L.Ed. 2d 1247, 88 S. Ct. 967 (1968); Walder v. United States, 347 U.S. 62, 98 L.Ed. 503, 74 S. Ct. 354 (1954).

Section 90.106 Summing up and comment by judge.

A judge may not sum up the evidence or comment to the jury upon the weight of the evidence and the credibility of the witnesses.

COMMENT

This section codifies the existing Florida law that a judge may not comment on the weight of the evidence, the credibility of a witness or the guilt of the accused. See Seward v. State, 59 So. 2d 529 (Fla. 1952); Hamilton v. State, 261 So. 2d 184 (Fla. 3rd Dist. 1972); Lister v. State, 226 So. 2d 238 (Fla. 4th Dist. 1969).

The basis for this section was expressed in Hamilton v. State, 109 So. 2d 422 (Fla. 3rd Dist. 1959):

> The dominant position occupied by a judge in the trial of a cause before a jury is such that his remarks or comments. . . overshadow those of the litigants, witnesses and other court officers. Where such comment expresses or tends to express the judge's view as to the weight of the evidence, the credibility of a witness, or the guilt of the accused, it thereby destroys the impartiality of the trial. . . .

Under existing Florida law, remarks made by a judge in a jury trial which constitute forbidden comment, to which no objection is made, do not require a reversal unless they constitute fundamental error. Worthington v. State, 183 So. 2d 728 (Fla. 3rd Dist. 1966).

It is envisioned that under this section such Florida law will remain unchanged.

Fed. Rule Evid. 105 provides that after the final arguments of counsel, the judge may comment on the weight of the evidence, if he also instructs the jury that they are not bound by his comments.

Section 90.107 Limited Admissibility.

When evidence which is admissible as to one party or for one purpose but inadmissible as to another party or for another purpose is admitted, the judge, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

COMMENT

This section allows evidence which is incompetent as to one party or issue, but admissible as to another, to be offered and received by the court for only the specific purpose for which it is competent. The section also requires the court to instruct the jury of the limited purpose for which the evidence may be considered when a request for such instruction is made. Under Section 90.403, the court can exclude such evidence if it deems it to be so prejudicial that a limiting instruction would not adequately protect a party.

In Barnett v. Butler, 112 So. 2d 907, 910 (Fla. 2nd Dist. 1959), in a case involving the ownership of a negligently operated automobile, the court recognized that evidence could be admissible for a limited purpose and said:

the court can, by appropriate charge, impress upon the jury the importance of considering the evidence of insurance only to the extent of shedding light on the issue of ownership.

This section follows the rule expressed in Sprinkle v. Davis 111 F.2d 925, (4th Cir. 1940) and recognized in most jurisdictions. California Evid. Code §355 and Fed. Rule Evid. 106 contain similar provisions. New Jersey Evid. Rule 6 also contains a similar rule, with the exception that a request for a limiting instruction need not be made.

Section 90.108 Remainder of or Related Writings or Recorded Statements.

Except as provided in Florida Rules of Civil Procedure 1.330(b) and 1.340(b), an adverse party may require the party introducing a writing or recorded statement or part thereof to introduce contemporaneously any other relevant part or any other writing or recorded statement that is relevant to that portion introduced and is otherwise admissible.

COMMENT

Generally, when a party introduces only a part of a writing or document, the adverse party may prove the contents of the remainder of the instrument or require his adversary to do so. See Crawford v. United States, 212 U.S. 183, 53 L.Ed. 465, 29 S.Ct. 260 (1909). The remainder of the document or writing can only be admitted in so far as it relates to the same subject matter and tends to explain and shed light on the meaning of the part already received. McCormick, Evidence §56 (2nd ed. 1970).

This section allows an adverse party to have his opponent introduce the remainder of a writing at the same time that a portion of it is introduced, and also have contemporaneously introduced any other writing or recorded statement which is

relevant to the portion introduced and is otherwise admissible. The reasoning of this section is twofold. First, it avoids the danger of mistaken first impressions when matters are taken out of context. Second, it avoids the inadequate remedy of requiring the adverse party to wait until a later point in the trial to repair his case.

Fla. Rules of Civ. Pro. 1.330(b) and 1.340(b) provide that when portions of depositions and interrogatories are not offered by a party, an adverse party may require the introduction of any other part that in fairness ought to be considered with the part introduced, and any party may introduce any other parts. This section specifically does not conflict with these rules.

This section does not apply to conversations but is limited to writings and recorded statements because of the practical problem involved in determining the contents of a conversation and whether the remainder of it is on the same subject matter. These questions are often not readily answered without undue consumption of time. Therefore, remaining portions of conversations are best left to be developed on cross-examination or as a part of a party's own case.

This treatment of conversations is in accord with Morey v. State, 72 Fla. 45, 72 So. 490 (1916), where in a criminal prosecution, when the state offered evidence of

inculpatory statements made by the defendant, the court found that the defendant had the right to have placed before the jury, by means of cross-examination, the entire conversation or all statements made by the defendant at the same time and relating to the same subject matter, whether such other statements or the remainder of the conversation are exculpatory in nature.

See Fed. Rule Evid. 107. Section 356 of the California Evidence Code allows the admission of remaining portions of acts, declarations, writings, and conversations that have been received in part.